United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-1188

To be argued by
JOHN N. BUSH

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1188

B
P/S

UNITED STATES OF AMERICA,
Appellee,

—v.—

BENJAMIN RODRIGUEZ,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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Preliminary Statement

Benjamin Rodriguez appeals from a judgment of conviction entered on April 6, 1976 in the United States District Court for the Southern District of New York after a four week trial before the Honorable Robert L. Carter, United States District Judge and a jury.

Indictment 74 Cr. 421, filed on April 16, 1974, charged defendant in two counts with attempted income tax evasion for the year 1967 (Count I) and with filing a materially false income tax return for the same year (Count II) violations, respectively, of Title 26, United States Code, Sections 7201 and 7206(1). Defendant's trial began on February 4, 1976 and concluded on March 2, 1976 when the jury found him guilty as charged on both counts.

On April 6, 1976, Judge Carter sentenced defendant to two years imprisonment on Count I. No sentence was

imposed under Count II, the Judge holding it was a lesser included offense of Count I.*

Defendant is enlarged on bail pending this appeal.

Statement of Facts

The Government's Case

A. Introduction.

Count I of Indictment 74 Cr. 421 charged that defendant attempted to evade his income taxes for 1967 by filing an income tax return that concealed a substantial portion of the taxable income he realized in that year. The count concluded with the averment that the source of defendant's unreported income came "from the purchase and sale of heroin."

At trial, the Government first put in evidence of defendant's tax evasion under an expenditures theory.** The proof here showed that defendant had a limited amount of assets at the beginning of 1967 but that he spent over $66,000, mostly during the last two months of the year, which was neither accounted for in the taxable income he reported nor attributable to non-taxable

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* Because there was no sentence on Count II, the instant appeal is only from the conviction under Count I.

** Under this theory, if expenditures in a given year are substantially over and above reported income and all non-taxable items, an inference is permitted, absent a satisfactory explanation, that the unaccounted for difference or balance is unreported taxable income for the year in question. *E.g., United States* v. *Bianco*, Dkt. No. 75-1244, slip op. at 3100-3107 (2d Cir. April 8, 1976). As is set forth in the text, the Government also independently proved defendant's tax evasion by the specific items method—in this case by proof of defendant's profits from heroin trafficking.

sources. The Government then proved that in the three month period preceding November, 1967, the defendant had received significant profits by acting as a middleman in the sale of 56 kilograms of pure heroin, which had been smuggled into the United States.

In summation, the Government argued that the direct proof of defendant's profits from his heroin transactions, the circumstantial proof of his expenditures over and above his reported income and the cumulative effect of the direct and circumstantial proof established beyond any reasonable doubt that defendant had attempted to evade his income taxes in 1967.

B. Defendant's Expenditures.

On September 20, 1966, defendant signed a financial statement which he filed with the Peoples Trust Company of New Jersey to secure that bank's approval of his application to assume a mortgage on a home he was purchasing in Teaneck, New Jersey. (Tr. 46-55; GX. 3).* The financial statement showed that he had a net worth of $36,000 and that his assets were largely non-liquid in nature. Indeed, he was only able to afford to purchase the home because the sellers of the premises were willing to give him a second mortgage in the amount of $11,000. (Tr. 143-162; GX. 34, 36).** Prior to the purchase of his new home, defendant had lived with his family in limited income housing in the Bronx. (Tr. 56-68; GX. 54, 55, 56). An examination of defendant's financial condition at the end of 1966 showed, furthermore, that he had no appreciable money on deposit in any banks (Tr. 98-

* "Tr." refers to the trial transcript; "GX" refers to Government Exhibit; "Ct. Ex." refers to Court Exhibit; "Br." refers to Appellant's Brief.

** Similarly, when in the same year, defendant purchased a new car, he had to secure a loan to cover $3,900 of the purchase price. (Tr. 367-395; GX. 44, 46, 47B, 48A).

102, 167-177, 356-366; GX. 13, 14A, 15A, 18, 19) and no visible means of support.*

During the first seven months of 1967, defendant's financial posture did not improve, and he made only minimal expenditures. (Tr. 460-477, 513-555; GX. 65A) He was late more than once in making his second mortgage payments (Tr. 143-162; GX. 38B, 38C) and repeatedly failed to pay his monthly car loan installments on time (Tr. 377-395; GX. 48A). But, beginning in about August, 1967, defendant's financial picture began to show dramatic signs of improvement. His new found wealth climaxed in the last two months of 1967 when he spent over $64,000 (Tr. 555-558; GX. 65B), most of it for stock investments and for mortgages on real estate (Tr. 203-207, 225-234, 326-335, 412-420; GX. 30A, 30B, 40, 41A, 41B, 42A, 42B, 50).

Viewed in its totality, defendant spent a minimum of $79,689.09 in 1967. Of this sum, $6,013.60 was attributable to non-taxable sources, $3,260 was reported as taxable income and $66,415.49 was spent by defendant, which could be traced neither to non-taxable sources nor to any income reported by him on his tax return. (Tr. 460-477, 513-573, 1242-1294; GX. 1, 64, 65, 65A, 65B, 81, 192. 193).**

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* In various documents signed by defendant at about this time, he stated that he was working at one and the same time in 1965 and 1966 for Bell Distributors ($10,000 per year) (GX. 33), Ingrid's Copa Nite Club ($150 per week) (GX. 47) and Mel Rich Home, Inc. ($10,000 per year) (GX. 54). The owner of Bell Distributors testified, however, that defendant was never one of his employees (Tr. 214-224), and defendant's social security record bore no entries showing he had ever worked for either of the other two concerns (Tr. 395-406; GX. 82A).

** Except for a car which was traded in and one $5,000 mortgage, all of the assets defendant listed on his September 20, 1966 financial statement were still owned by him at the end of 1967. (Tr. 513-573; GX. 3, 65, 81).

C. Defendant's Heroin Transactions.

In the Spring of 1967, Claude Pastou, an international peddler of narcotics, was introduced to the defendant by several men with whom Pastou had already been dealing in narcotics. A short time later, defendant and his associates told Pastou that they would be able to dispose of any large quantities of heroin which Pastou could arrange to deliver to them. Pastou then set about to supply these men with heroin. (Tr. 918-932).

In August or September, 1967, Pastou contacted defendant and told him he had 30 kilograms of heroin to sell to him. After suitable arrangements were made, Pastou met with defendant at 32nd Street and Third Avenue and, while driving in defendant's car a few blocks away, left with him a suitcase containing 21 kilograms of the heroin. The next day the additional nine kilograms of heroin were delivered to defendant in the same fashion. One day later, after defendant and his associates had analyzed the heroin for purity, defendant paid Pastou $11,000 in cash for each of the 30 kilograms of heroin. (Tr. 932-939).

Approximately two weeks later, Pastou sold defendant an additional 12 kilograms of heroin, again for $11,000 per kilogram. Delivery of the heroin was made in the same manner as before with payment taking place one day after delivery. (Tr. 940-953). Finally, in October, 1967, Pastou made his last sale to defendant, this time of 16 kilograms of heroin. The heroin was exchanged as before, and the purchase price of $11,000 per kilogram was to be paid the next day. On this occasion, however, defendant was short $5,000 to $6,000 of the purchase price and told Pastou that he would have to wait to be paid this sum until his buyers could in turn pay him in full. Before defendant could pay Pastou the money

he owed him, Pastou was arrested by Spanish authorities while traveling in Spain. (Tr. 953-963).*

The defendant's inability to pay Pastou until a day after delivery and his inability to pay in full on one occasion corroborated the expenditures proof showing that defendant did not have sufficient funds in August, 1967 to purchase Pastou's heroin on his own behalf. From this, it was apparent that defendant acted as a middleman in his transactions with Pastou, funnelling Pastou's heroin on to purchasers and passing the purchasers' money back to Pastou. An expert from the Drug Enforcement Administration testified that defendant's profit mark-up on the heroin he handled would have netted him approximately $191,000. (Tr. 1159-1188).** None of this

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* Pastou's testimony concerning his transactions with defendant was corroborated in many important respects. To take three examples, Pastou testified that each time he met defendant to give him the heroin, the defendant was driving a wine color Lincoln Continental. (Tr. 935-936, 944, 958). The Government established defendant owned such a car in 1967 (Tr. 367-377, 1300-1301; GX. 44, 46). Pastou further testified that he had been introduced to defendant because the man with whom he had been dealing, Alfonsito [Oswaldo], was having trouble with the police in New York City. (Tr. 928-930). The Government proved that at about the time Pastou met defendant, Alfonsito had been indicted and was a fugitive. (Tr. 1224-1225, 1230-1231; GX. 71, 73A). Lastly, the Government produced the false bottomed suitcase which was used to smuggle one load of heroin sold to defendant into the United States, and by calling a Drug Enforcement Administration chemist established that the trunk in fact still had minute particles of heroin in it in 1976. (Tr. 1110-1123; GX. 190).

** Expanding the expenditures analysis to include the first few months of 1968, the Government proved that the defendant had spent at least $144,000 in roughly a five month period beginning November 1, 1967 on real estate, stocks and other investments. (Tr. 203-206, 225-234, 412-420, 1211-1223; GX. 30A, 30B, 42, 42A-42C, 50, 53, 53A-53C).

money was reported as income on defendant's 1967 tax return. (Tr. 1276-1283; GX. 1, 194, 195).

The Defendant's Case

In addition to lengthy and often times heated cross-examinations of Pastou and other Government witnesses, the defendant called eight witnesses of his own at trial, the majority of whom testified at length. In major part, they testified that defendant had moved to Puerto Rico in the early 1960's where he had speculated in real estate, using various corporations as vehicles for this purpose. The witnesses further testified that in November, 1965, defendant sold to Feliciano Adorno Medina a property known as the Meson Madrid Hotel together with all of the stock in the Suchville Towers Corporation and in the Beach Front Corporation for a total consideration of $55,000 in cash, $144,500 in promissory notes and a house deemed to be worth $100,000. (Tr. 1315-1381, 1489-1507, 1564-1584, 1619-1637, 1686-1711, 1743-1776). The theory of the defense in presenting this evidence was evidently to destroy the validity of the starting point utilized by the Government in its expenditures analysis and to establish that by the end of 1966, defendant was a man of legitimate wealthy means, one who by inference would not engage in heroin transactions.*

The Government contended, on the other hand, that defendant had not kept any of the funds from these Puerto Rican realty transactions because defendant had been representing Raymond Marquez or others in these

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* Two of the defense witnesses also testified as to minor business dealings they had with defendant prior to January 1, 1967. The sums of money involved in these transactions were too small, however, to have had any real impact on the Government's expenditures analysis. (Tr. 1666-1679, 1709-1710).

transactions. This line of attack was developed on cross-examination (Tr. 1381-1419, 1422-1470, 1507-1557, 1585-1613, 1652-1661, 1804-1860) and in the Government's rebuttal case (Tr. 1879-1882, 1887-1893, 1926-1930, 1941-1950, 1973-1974). In both instances, it was brought out that many of the defense witnesses had made prior inconsistent statements, in which they had stated that Marquez and other individuals, rather than defendant, had owned the Puerto Rican property in question. The Government's ultimate proof on the issue came when a F.B.I. agent testified that during an interview of defendant in the early 1960's, defendant himself had said he was in Puerto Rico to make investments in real estate on behalf of Raymond Marquez. (Tr. 1907-1—1908).

The Jury's Deliberations

Because defendant raises several points on appeal relating to the jury's deliberations, a review of those deliberations at this point may help clarify the substantive arguments when they are reached for discussion. The jury retired to deliberate at about noon on March 1, 1976. (Tr. 2144). In mid-afternoon of that day, following several requests to be shown exhibits (Ct. Ex. 1, 2), the jury asked the District Court whether the Government, assuming the Government's expenditures analysis was valid, had to prove under the expenditures theory that defendant's unreported income came from "heroin trafficking." (Tr. 2145; Ct. Ex. 4). After the reading of certain testimony also requested by the jury (Tr. 2158, Ct. Ex. 5), the court responded by charging the jury that while the Government had presented evidence that monies expended by defendant were derived from heroin transactions, the prosecution need not prove under the expenditures theory that the unreported income came from any specific source (Tr. 2158-2160).

Shortly after this exchange between court and jury, the jury sent a note stating that they could not reach a unanimous verdict. Judge Carter asked them to continue their deliberations. (Tr. 2162-2163; Ct. Ex. 6). At about 6:00 p.m. on the same day, the jury then sent a note saying that one juror felt the "entire court was hostile at all times to the defendant's cause of action" and that the jury felt they could not reach a unanimous verdict since one juror believed "a fair trial had not taken place." (Tr. 2164; Ct. Ex. 7). Upon receiving the note, Judge Carter excused the jury for the night, telling them he would answer their note the following morning. (Tr. 2164-2165).

The next morning Judge Carter charged the jury at length in response to their note of the night before. The details of what he said will be examined subsequently in the brief, but in substance, he told them that they were to decide the factual issues raised in the case while he was to rule on the law and that it was his duty, not theirs, to insure that there was an atmosphere in the courtroom where there could be a rational and fair trial. (Tr. 2169-2174). He went on to give the jury a modified Allen charge. (Tr. 2174-2178).

Later that morning and in the early afternoon, the jury asked to see additional exhibits and to have further testimony read to it. (Tr. 2181-2186; Ct. Ex. 9, 10). At about 3:45 p.m., the jury sent a note to the judge, who was by then in the midst of a hearing regarding a preliminary injunction (Tr. 2186), saying they were deadlocked 11 to 1 for conviction with the lone holdout continuing to argue that the trial was conducted in "an atmosphere detrimental to defendant's cause of action." (Tr. 2192-2194; Ct. Ex. 11). Without consulting counsel, Judge Carter sent back word to the jury to continue its deliberations and continued with the preliminary injunction hearing. (Tr. 2192-2193).

Approximately one hour later, the jury sent another note, this time asking for the testimony of a witness to be read. (Tr. 2190; Ct. Ex. 12). At this juncture, Judge Carter advised counsel of the jury's most recent request and of the note to which he had already responded. (Tr. 2190-2193). Following the reading of the requested testimony, the jury again retired. At 7:00 p.m. on the same day, it returned with its guilty verdict. (Tr. 2194-2195).

ARGUMENT

POINT I

The District Court properly construed the indictment when it charged the jury that under the expenditures theory, it need not find defendant's unreported income came from any particular source.

Defendant was charged in the count of the indictment now on appeal with attempting to evade his income taxes for 1967 by concealing his true taxable income when he filed his income tax return for that year. The count concluded with the averment that in the tax return defendant filed for 1967 he stated "his taxable income was the sum of $3,260" and that he had failed to include therein income received by him "from the purchase and sale of heroin."

To establish defendant's tax evasion, the Government in part utilized the expenditures method of proof and argued under this theory that the profits from defendant's heroin transactions were the probable source of his unreported income. During its deliberations, the jury asked if under the expenditures theory the Government had to

prove that defendant's taxable income came from "heroin trafficking," * to which Judge Carter responded:

> Under the expenditure theory, the Government proposed to you that a likely source of the income was narcotics trafficking, but the Government need not prove that the expenditures necessarily came from a particular source. If you are convinced that the Government has negatived or negated all plausible non-taxable sources of income, then in order to convict the defendant under the expenditure theory method you need not find that he made his income from any particular source. (Tr. 2159-2160).

Defendant argues on appeal that this charge amended the indictment by deleting the requirement that the Government had to prove defendant's unreported income came from heroin trafficking and, consequently, permitted the jury "to rest conviction on charges never made against him." (Br. 8).

Since the decision in *Ex Parte Bain*, 121 U.S. 1 (1887), the law has been that a defendant has the right to stand trial on an indictment voted by a grand jury and not thereafter amended except by a new vote of the grand jury. Over the years, the *Bain* doctrine has come to mean that "a court cannot permit a defendant to be tried on charges that are not made in the indictment against him." *Stirone* v. *United States*, 361 U.S. 212, 217 (1960);

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* The jury's note read in full:

> Please may we have an answer to:
>
> Is it sufficient evidence of guilt that the defendant spent monies in 1967 in excess of reported income regardless of the source of that income, presuming his net worth was as stated in the 1966 statement of net worth or did that income have to come from heroin trafficking? (Ct. Ex. 4).

United States v. *Chin*, Dkt. No. 75-1227, slip op. at 3367 (2d Cir. April 21, 1976); *United States* v. *Cirami*, 510 F.2d 69, 72-73 (2d Cir.), *cert. denied*, 421 U.S. 964 (1975). Factual averments in an indictment going beyond the essential elements of the crime charged may, on the other hand, be dropped without working an impermissible amendment of the indictment. *E.g.*, *United States* v. *Archer*, 455 F.2d 193, 194 (10th Cir.), *cert. denied*, 409 U.S. 856 (1972); *United States* v. *Cirami*, *supra*, 510 F.2d at 73; *United States* v. *Colasurdo*, 453 F.2d 585, 590 (2d Cir. 1971), *cert. denied*, 406 U.S. 917 (1972). In determining what averments are essential to proof of a crime charged, courts normally look to those elements minimally necessary to protect the accused against another prosecution for the same offense and to inform him of the charges against him. *Hamling* v. *United States*, 418 U.S. 87, 117 (1974); *United States* v. *D'Anna*, 450 F.2d 1201, 1204 (2d Cir. 1971).

More particularly, with respect to income tax evasion cases, each year involved constitutes a separate offense. *United States* v. *Smith*, 335 F.2d 898, 901 (7th Cir. 1964), *cert. denied*, 379 U.S. 989 (1965); *Costello* v. *Immigration and Naturalization Service*, 311 F.2d 343, 347 (2d Cir. 1962), *rev'd on other grounds*, 376 U.S. 120 (1964); *United States* v. *Schipani*, 293 F. Supp. 156, 161 (E.D.N.Y. 1968), *aff'd*, 414 F.2d 1262 (2d Cir. 1969), *cert. denied*, 397 U.S. 922 (1970). To prove the crime for any particular year, the prosecution must establish three essential elements—that the defendant realized substantial unreported income, that he made an attempt to evade his taxes on this income and that he did so wilfully. *Sansone* v. *United States*, 380 U.S. 343, 351 (1965); *United States* v. *Coppola*, 425 F.2d 660, 661 (2d Cir. 1969). No set amount of unreported income must be proven, *United States* v. *Slutsky*, 487 F.2d 832, 842 (2d Cir. 1973), *cert. denied*, 416 U.S. 937 (1974); *United*

States v. *Marcus*, 401 F.2d 563, 565 (2d Cir. 1968), *cert. denied*, 393 U.S. 1023 (1969), nor must the prosecution, where it resorts to an indirect method of proof, prove the source of a defendant's unreported income, *United States* v. *Massei*, 355 U.S. 595 (1958); *United States* v. *Calles*, 482 F.2d 1155, 1159 (5th Cir. 1973); *United States* v. *Ford*, 237 F.2d 57, 65 at n.12 (2d Cir. 1956), *vacated as moot*, 355 U.S. 38 (1957).

In light of the foregoing, the present indictment would have been legally sufficient even if it had not included the clause averring the amount of taxable income reported by defendant and the source of his unreported income.* With or without that clause, defendant would have been apprised of the nature of the charges against him and

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* The indictment is set forth below with the surplusage material bracketed.

> Commencing on or about the 1st day of January, 1967 and continuing thereafter up to and including the 15th day of April 1968, in the Southern District of New York, BENJAMIN RODRIGUEZ, a/k/a "Bennie One-Eye", did unlawfully, wilfully and knowingly attempt to evade and defeat a large part of the income tax due and owing to the United States of America by him by concealing and attempting to conceal from all proper officers of the United States of America his true and correct taxable income, and by preparing and causing to be prepared, signing and causing to be signed, and by mailing and causing to be mailed a false and fraudulent income tax return for 1967 which was filed with the Internal Revenue Service, [wherein it was stated that his taxable income was the sum of $3,260 and that the amount of income tax due and owing thereon was the sum of $494.20, whereas, as he then and there well knew, his taxable income for the said calendar year and taxes due thereon were substantially greater than the amounts stated in that he had received income on which income tax was due and owing to the United States of America by him from the purchase and sale of heroin.]

protected against being tried again on a charge of income tax evasion for 1967. Put differently, the crime charged in the indictment was the wilfull attempt to evade taxes and the clause now in question was mere surplusage.* *See United States* v. *Cirami*, *supra*; *United States* v. *Rosenblum*, 176 F.2d 321, 323-324 (7th Cir.), *cert. denied*, 338 U.S. 893 (1949). The District Court properly concluded, therefore, that the source of defendant's income as alleged in the indictment was not an element of the crime which had to be proved under the expenditures theory and that its inclusion in the indictment was simply an indication of defendant's probable source of unreported income.

Judge Carter's interpretation of what proof was required under the present indictment was, in fact, entirely consonant with prior interpretations by this and other Courts of indictments similar to this one. For example, in *United States* v. *Rosenblum*, *supra*, 176 F.2d at 323-324, the Seventh Circuit held that the prosecution need not prove that defendant's unreported income came from the source alleged in the indictment and that this construction of the indictment did not amend the charge

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* The critical difference between this and the *Stirone* case, on which defendant so heavily relies, is that here the allegation as to defendant's source of income in the indictment was mere surplusage; whereas, in *Stirone*, which involved a violation of the Hobbs Act, 18 U.S.C. § 1951, the proof of the interstate commerce averment alleged in the indictment went to one of the "essential elements of a Hobbs Act crime" and could not "be treated as surplusage." *Stirone* v. *United States*, *supra*, 361 U.S. at 218. Moreover, unlike the situation in the instant case and as this Court noted in *United States* v. *Cirami*, *supra*, 510 F.2d at 72-73, the *Stirone* decision disapproved of the addition by the trial court of "charging language, rather than its deletion."

voted by the grand jury. As to the latter point, it reasoned:

> A variance is not regarded as material unless it is of such a substantive character as to mislead the accused in preparing his defense or place him in second jeopardy for the same offense.
>
> * * *
>
> Here, the gravamen or the essential ingredient of the charge was the wilful attempt to evade and defeat the tax. The statute says that every attempt to evade or defeat the payment of income tax is a violation of the law. It is sufficient to charge a defendant with acts coming within the statutory description in the substantial words of the statute.
>
> * * *
>
> Hence, that part of the indictment which gave the break-down of the gross income and allowable deductions was surplusage or a mere defect or imperfection in form which did not tend to the prejudice of each defendant, and as such, need not be proved. *United States* v. *Rosenblum*, *supra*, 176 F.2d at 324.

Likewise, this Court in *United States* v. *Cirami*, *supra*, 510 F.2d at 72-73, held that a trial court may properly permit the deletion of that part of a tax indictment not necessary to a statement of the offense. In *Cirami*, the indictment, which charged corporate officers with filing false tax returns on behalf of several corporations, erroneously alleged that the officers of the corporations, rather than the corporations, owed the unreported taxes. The District Court permitted, upon the Government's motion, the deletion of the erroneous allegation from the indictment, and this Court affirmed, holding that the struck phrase was "plainly surplusage." Furthermore,

just as the source of income in *Rosenblum* was not material to the allegation that Rosenblum had evaded his taxes, this Court held that the question of who actually owed the taxes in *Cirami* was of "no relevance" to the tax evasion charges in the case before it.

Moreover, the defendant was neither prejudiced by any change in the Government's proof nor surprised by the evidence adduced against him. Consonant with the indictment, the Government insisted both pretrial and throughout the trial that defendant's income had indeed come from heroin transactions. Thus, reliance by defendant on cases involving prejudicial variances is entirely misplaced.*

In sum, then, the District Court's charge—that, while under the expenditures theory the Government argued defendant's unreported income came from heroin transactions, the actual source of defendant's unreported income need not be proven beyond a reasonable doubt—did not amend the indictment; rather it correctly construed the crime charged therein.

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* Defendant, for example, cites *United States* v. *Botticello*, 422 F.2d 832 (2d Cir. 1970). However, there the Government's theory of proving that defendant violated Section 1952 of Title 18, United States Code, (interstate travel in aid of racketeering) was to show that Botticello left New York and traveled in interstate commerce for the purpose of making an extortionate threat. The trial judge changed the theory of the case, however, and improperly allowed the jury to convict on the basis that defendant's return trip to New York after making his extortionate threat would satisfy the interstate element of the crime charged. Cf. *United States* v. *Pelose*, Dkt. No. 76-1025, slip op. at 4900-4901 (2d Cir. July 12, 1976).

POINT II

The prosecutor's closing argument did not infringe on defendant's Fifth Amendment rights.

Defendant selects two comments in the prosecution's summation and states they improperly drew attention to his failure to testify. The first comment came in the prosecutor's initial argument * when the following was said:

> Mr. Bush:
>
> * * * * *
>
> Secondly, Mr. Pastou was subjected to a vigorous cross-examination, but the Government submits to you that his testimony was not shaken in any important regard.
>
> Moreover, no evidence was introduced to controvert——
>
> Mr. Krieger: Oh, I object to this and move for the withdrawal of a juror. He is shifting the burden, if the Court please. The defendant is not under any duty or imposed duty to introduce any evidence as to any matter concerned in this case.
>
> Mr. Bush: May I continue?
>
> The Court: You may continue, Mr. Bush.
>
> * * * * *
>
> Mr. Bush: His testimony, furthermore, was not controverted in any significant fashion. Indeed, in many important regards it was corroborated and substantiated. (Tr. 2007-2008).

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* Summations were made under the new rule of the District Court requiring the Government to argue first and then giving it an opportunity to reply to defense argument. Criminal Rules for the S.D.N.Y. and E.D.N.Y., Rule 3 A.

The second took place in the Government's reply argument when the colloquy set forth below took place between Court and counsel:

> Mr. Bush:
>
> * * * * *
>
> Defense counsel would have you believe that beginning in November '65, in the first six months of '66, his client received hundreds of thousands of dollars in cash, and for some reason they lay fallow from '65, the first part of '66, nothing happened to them, they were hidden some place, until the very end of '67 when all of a sudden in November and December of '67, in January and February and March of '68, he begins to spend massive amounts of money.
>
> Defense counsel said, "You should keep your cash where you can use it." What evidence was produced where this cash was? Was it hidden under a rug?
>
> * * * * *
>
> Mr. Krieger: I object to it, if the Court please.
>
> The Court: I think that the Government has a right to comment on your argument.
>
> * * * * *
>
> Mr. Bush: Where was this money, hidden under a rug? A mattress? In a sock? Where were the rugs, the mattresses and the socks in this case? (Tr. 2078-2080).

Based on these two comments, defendant concludes that "the prosecutor clearly implied that the jury should consider the defendant's failure to testify in determining defendant's guilt or innocence" and that reversal of his conviction is, therefore, required.

A defendant has the right not to testify at trial, and no adverse comment may be drawn from his failure to do so. *Griffin* v. *California*, 380 U.S. 609 (1965). Under this rule, criticism is frequently made that while a prosecutor did not directly call to the jury's attention a defendant's failure to testify, he effectively did the same thing by other comments which he made. Where this in fact has occurred, the prosecutor has committed error, which if serious enough may require reversal. *See, e.g., United States* v. *Smith*, 500 F.2d 293 (6th Cir. 1974). In determining whether unfair, indirect comment has been made, this Court has adopted the formula:

> Was the language used manifestly intended to be, or was it of such character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify." *United States ex rel. Leak* v. *Follette*, 418 F.2d 1266, 1269 (2d Cir. 1969), *cert. denied*, 397 U.S. 1050 (1970).

See also United States v. *Dioguardi*, 492 F.2d 70, 81-82 (2d Cir.), *cert. denied*, 419 U.S. 873 (1974); *United States* v. *Lipton*, 467 F.2d 1161, 1168-1169 (2d Cir. 1972), *cert. denied*, 410 U.S. 927 (1973). Nothing in the rule against making unfair comment, however, either prevents the prosecutor from "arguing the strength of his case by stressing the credibility and lack of contradiction of his witnesses," *United States ex rel. Leak* v. *Follette*, *supra*, 418 F.2d at 1270, or from commenting "upon the defense's failure to call witnesses [other than the defendant] to contradict the government's case," *United States* v. *Lipton*, *supra*, 467 F.2d at 1168. *See also United States* v. *Noah*, 475 F.2d 688, 695-696 (9th Cir.), *cert. denied*, 414 U.S. 1095 (1973).

The comment made by the prosecutor in the instant case with respect to Pastou's testimony did not "naturally

and necessarily" direct the juror's attention to defendant's failure to testify.* Pastou's testimony could have been controverted in many important respects without defendant having to take the witness stand, including, amongst others, introducing evidence that Pastou had made prior inconsistent statements, proving that details of his testimony that could be challenged by others were not true,** and establishing that he had falsely testified previously, making him unworthy of belief.*** Given the absence of such proof by defendant and the often times impassioned cross-examination of Pastou by defense counsel, the prosecutor was entitled in his summation to call attention to the strength of Pastou's testimony in this regard in arguing in favor of his credibility.

As for the prosecutor's remarks on the absence of the "rugs," "mattresses" and "socks" in which defendant hid his money, this remark too was entirely proper within the context of the facts of the case. Defendant called eight witnesses in an effort to establish that by the beginning of 1967 he was a man of some means. Collectively,

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* If anything, defense counsel's comments in his own summation, not the prosecutor's comments, drew attention to the defendant's failure to take the witness stand. (Tr. 2049-2050).

** For example, Pastou testified that on several occasions when he had spoken with defendant he had met defendant's son. (Tr. 942). No attempt was made to controvert the fact that defendant had a son of the age Pastou described, that the son was in the area Pastou testified he was or that the meetings had in fact taken place. To take a second example, Pastou testified defendant always drove a wine color, Lincoln Continental. (Tr. 935-936, 94[illegible] 958). Defendant made no effort to call a friend, relative or neighbor to dispute this fact.

*** Naturally, defendant could also have produced alibi witnesses or witnesses to testify that Pastou was not where he said he was when dealing with defendant. In fact, defense counsel made comment on defendant's failure to produce this type of proof in his summation. (Tr. 2050).

their testimony, if believed, would have led the jury to the conclusion that defendant had substantial amounts of cash and significant other assets at that time. Indeed, defense counsel devoted a good portion of his closing argument to talking about the transactions which could have led to the creation of these assets. (Tr. 2035-2070). Yet, defendant in the course of a four week long trial was unable to introduce any proof, certainly in part at least available from witnesses other than himself, that these assets existed at the beginning of 1967. The prosecutor's comments did no more than rebut the arguments of defense counsel and correctly call the jury's attention to this weakness in defendant's case.* *Cf. United States* v. *Dioguardi, supra*, 492 F.2d at 82; *United States* v.

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* Assuming arguendo that the prosecutor's comments cited by defendant were improper, they took up at best an insignificant portion of the prosecutor's summation and were harmless error. *See United States* v. *Alfonso-Perez*, Dkt. No. 75-1395, slip op. at 3768-3770 (2d Cir. May 17, 1976); *Haberstroh* v. *Montayne*, 493 F.2d 483 (2d Cir. 1974).

Defendant also claims his trial was prejudiced because the prosecutor unfairly called attention to a witness's prior invocation of the attorney-client privilege, improperly called Raymond Marquez a numbers operator and elicited from a witness that he was assigned to the organized crime strike force (Br. 21-24). The attorney-client privilege, however, was simply mentioned in passing when another related part of the prior sworn testimony of the witness was being read to impeach him. (Tr. 1533-1535). The reference to Raymond Marquez as a numbers operator (Tr. 1832-1833) was made in anticipation of the later use of defendant's own statement in which he so referred to Marquez. (Tr. 1907-7—1907-8). Lastly, the assignment of a Government witness to the strike force was brought out when certain background material was being elicited from him, and any error created in that respect was cured by a prompt instruction from the Court. (Tr. 1243-1248). Defendant further complains that Judge Carter unfairly restricted his counsel's cross-examination. But, an examination of the entire record shows that defendant's counsel was in fact given great latitude in cross-examination.

Noah, supra, 475 F.2d at 695-696; *United States* v. *Lipton, supra*, 467 F.2d at 1168-1169.

POINT III

The trial judge's supplementary instruction properly advised the jury of its function in the case and did not unfairly coerce it to reach a verdict.

As previously indicated, at the close of their first day of deliberations, the jury sent Judge Carter a note stating that one juror felt that "the entire court was hostile at all times to defendant's cause of action" and that the jury was deadlocked because that one juror "feels a fair trial has not taken place here." * Upon receipt of the note, Judge Carter excused the jury for the night. The next morning, he set out to instruct the jury in response to their note.

He told them first that they had taken an oath to decide the facts based "solely on the evidence" and not on some "hidden, unrevealed personal agenda which you would attempt to pursue." (Tr. 2169). He then went on to instruct them as to the separate functions of court and jury, beginning by saying with respect to the fair conduct of the trial:

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* The jury's note reads in full:

> One juror in our group feels that the courtroom atmosphere and the entire court was hostile at all times to the defendant's cause of action.
>
> Therefore, we cannot really ever come to a unanimous conclusion since that juror feels a fair trial has not taken place here.
>
> Doesn't this mean then that we are impossibly locked and unable to give a verdict. (Ct. Ex. 7).

> The function of the court is, one, to maintain order and to be sure that the trial process proceeds in an atmosphere where there can be a rational and fair trial.
>
> In the first instance, the ultimate responsibility of the Court is to insure that there is a fair trial. That is not the responsibility of the jury. The jury's responsibility is to decide the facts based on the evidence.
>
> My function is not to invade your responsibility and to decide the facts for you. That is your job. But my job is to insure in the first instance that this trial proceeded in accordance with the rules of law in respect to fairness. (Tr. 2170).

Making it clear that they were the final arbiters of the facts (Tr. 2171-2172), he went on to say that his function in insuring a fair trial was subject to review by the Court of Appeals as follows:

> I am here to attempt to interpret the law as I understand it, and if an atmosphere in this courtroom has been created so there is unfairness to a defendant in a case before me, and if the jurors follows its function and applies the law to the facts that defines it and comes back with a verdict of acquittal, then at that point the defendant obviously, even though he has been affected by it hasn't been adversely affected.
>
> On the other hand, if the jury comes back and applies the law to the facts and comes back with a conviction, if the atmosphere is such that there was unfairness, the case isn't over. That is what Appellate Courts are for. The Appellate Courts are here to supervise and to oversee me, the Court, and to be certain that errors of law do not creep in, and therefore no one is unduly and unfairly

> punished because the judge, either by personal prejudices or by whatever way, has made errors in the law. (Tr. 2171-2172).

With respect to the jury's role in insuring a fair trial, he told them that they too were concerned with fairness and said the way for them to insure the trial was fair "is not for you to violate your oath" in performing your fact finding function. (Tr. 2173). Lastly, he turned to the seeming deadlock of the jury and gave the jury a modified Allen charge. (Tr. 2174-2178).

Stripping the words of Judge Carter from any meaningful context, defendant complains that the judge eliminated the concept of fairness from the "gestalt" of the jury's verdict, "underminded the jury by directing its attention to the existence of an appeals court," improperly coerced them with his Allen charge and by references to "their oaths" and otherwise in an undefined fashion violated his rights under the Sixth Amendment. (Br. 29-30, 31, 32). When Judge Carter's supplementary instruction is viewed in its entirety, none of defendant's contentions has merit.

Considering first defendant's argument that Judge Carter took the concept of fairness away from the jury, the federal jury trial system works properly because of the separation of functions between judge and jury, a separation which must be drawn and regulated by the trial judge. *See Sparf* v. *United States*, 156 U.S. 51 (1895), one of the seminal cases on this subject. In a formulation frequently cited with approval, Judge Prettyman in *Curley* v. *United States*, 160 F.2d 229, 232 (D.C. Cir.), *cert. denied*, 331 U.S. 837 (1947) described the jury's function and the judge's role in insuring that the jury adheres to their function as:

> The functions of the jury include the determination of the credibility of witnesses, the weighing

> of the evidence, and the drawing of justifiable inferences of fact from proven facts. It is the function of the judge to deny the jury any opportunity to operate beyond its province. The jury may not be permitted to conjecture merely, or to conclude upon pure speculation or from passion, prejudice or sympathy.*

It is, of course, the judge's function to instruct the jury as to the law and to oversee the conduct of the trial. See 12 F. Poore, *Cyclopedia of Federal Procedure* §§ 48.103 and 48.211 (3rd ed. 1965) and the cases collected therein. In federal court, moreover, the judge is much more than a mere umpire or moderator for it is his duty "to see that any trial, including a criminal one, is fairly conducted." *United States* v. *Cuevas*, 510 F.2d 848, 850 (2d Cir. 1975); *see also United States* v. *Miley*, 513 F.2d 1191, 1205 (2d Cir.), *cert. denied sub nom.*, *Goldstein* v. *United States*, 423 U.S. 842 (1975); *United States* v. *Tyminski*, 418 F.2d 1060, 1062 (2d Cir. 1969), *cert. denied*, 397 U.S. 1075 (1970). Judge Carter's instructions on his function as compared to that of the jury and on his role in insuring a fair trial as compared to theirs were faithful to this body of law. He committed no error in his supplementary charge to the jury on this score.**

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* The quote taken from *Curley* is cited with approval, for example, in *United States* v. *Taylor*, 464 F.2d 240, 243 (2d Cir. 1972).

** Parenthetically, one juror's feeling that the trial was unfair because defendant somehow had not been permitted to prove his cause of action has absolutely no support in the record. Defendant called eight witnesses. Their combined testimony covers roughly 500 pages of the transcript. (Tr. 1316-1878). Furthermore, when defendant was unable to produce a witness in a timely fashion, Judge Carter adjourned the trial to insure that the witness would be present to testify. (Tr. 1723-1734).

As for his mention of appellate review, Judge Carter stated that the review by the Court of Appeals was of his rulings only and that the jury was the final arbiter of the facts. Clearly defined instructions such as these have been consistently approved. *E.g.*, *United States* v. *Marchese*, 438 F.2d 452, 455 (2d Cir. 1971), *cert. denied*, 402 U.S. 1012 (1971); *United States* v. *Miceli*, 446 F.2d 256, 259-260 (5th Cir. 1971). Error has only been found with such instructions where the jury has been led to believe that their decision on the facts is subject to review in the appellate process. Even then, only in cases where there is a grave likelihood that the jury may have been misled have appellate courts found reversible error. Compare *United States* v. *Fiorito*, 300 F.2d 424 (7th Cir. 1962) with *United States* v. *Cirillo*, 499 F.2d 872, 889 (2d Cir. 1974), *cert. denied*, 419 U.S. 1056 (1974) and *United States* v. *Greenberg*, 445 F.2d 1158, 1162 (2d Cir. 1971).

With respect to Judge Carter's modified Allen charge, the charge given conformed to the type of charge consistently approved by this Court. *E.g.*, *United States* v. *Bermudez*, 526 F.2d 89, 99-100 (2d Cir. 1975); *United States* v. *Tyers*, 487 F.2d 828, 832 (2d Cir. 1973), *cert. denied*, 416 U.S. 971 (1974); *United States* v. *Domenech*, 476 F.2d 1229, 1231-1232 (2d Cir.), *cert. denied*, 414 U.S. 840 (1973). At the point when the charge was given, the jury had been deliberating for one-half a day and at least one juror was confused as to his or her role in the deliberative process. Under these circumstances, Judge Carter committed no error when he gave the jury his modified Allen charge.*

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* Defendant's claim that Judge Carter somehow improperly coerced the jury by reference to their oaths is belied by the factual context in which the reference to their oaths appear. (Tr. 2169, 2172-2173, 2178). If anything, the Judge's comments served only to make the jurors more conscientious in the performance of their role in the trial.

Considered in its totality, then, the supplementary charge was fair to both the prosecution and the defense. It correctly stated the law and could not have misled the jury as to its lawful function in the case. Indeed, the charge was called for by the jury's note and served as a proper and forceful reminder to the jury that they should faithfully perform their duty to find the facts solely on the evidence presented to them.

POINT IV

The District Court's failure to notify counsel of the jury's note before advising the jury to continue with its deliberations was harmless error.

In mid-afternoon of the second day of its deliberations, the jury sent Judge Carter a note saying they had been deadlocked for some time at 11 to 1 for conviction and that the lone holdout felt the evidence was "insufficient for a verdict of 'guilty' " and defendant had not been given a fair chance to prove his "cause of action." (Tr. 2192-2194; Ct. Ex. 11).* The judge, by then immersed in a hearing over whether to grant a preliminary injunction (Tr. 2186), send word back to the jury, without first consulting counsel, to continue its deliberations. (Tr. 2192-2193).

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* The note reads in full:

> We, the members of the jury, have been voting on the verdict since 2:30 yesterday when we had 10 "guilty" one "undecided" and one "not guilty". On the tenth ballot the "undecided" shifted to "guilty" and the same juror still votes "not guilty."
>
> Apart from one juror feeling that the evidence is insufficient for a verdict of "guilty" this juror continues to feel that the trial was conducted in an atmosphere detrimental to the defendant's cause of action.
>
> Accordingly, we feel no further deliberations will be fruitful. (Ct. Ex. 11).

About one hour later, the jury sent another note requesting to have testimony read. (Ct. Ex. 12). Counsel were then advised of the existence of both notes, the testimony was read and the jury retired to deliberate again. (Tr. 2190-2193). Approximately another hour passed and the jury returned with its verdict. (Tr. 2194). Although no objection was made at the time, defendant now complains that Judge Carter's failure to advise him and his counsel of the jury's note before asking them to continue their deliberations constitutes reversible error.

Rule 43 of the Federal Rules of Criminal Procedure "guarantees to a defendant . . . the right to be present 'at every stage of the trial . . .'" *Rogers* v. *United States*, 422 U.S. 35, 39 (1975). The trial judge may not, therefore, "communicate with the jury in the absence of counsel and without notice to them." *United States* v. *Reynolds*, 489 F.2d 4, 8 (6th Cir. 1973), *cert. denied*, 416 U.S. 988 (1974). A forbidden communication, however, does not require reversal "if the record affirmatively indicates beyond a reasonable doubt that the error did not affect the verdict." *United States* v. *Crutcher*, 405 F.2d 239, 244 (2d Cir.), *cert. denied*, 394 U.S. 908 (1969); *see also United States* v. *Reynolds*, *supra*; *United States* v. *Arriagada*, 451 F.2d 487, 488-489 (4th Cir. 1971), *cert. denied* 405 U.S. 1018 (1972).

Judge Carter's communication to the jury without notice to either counsel was error, but it could not have conceivably affected the verdict. To begin with, the judge's instruction to the jury—nothing more than a request that they continue to deliberate—could not have swayed the jury to either side's prejudice. Secondly, by its subsequent note calling for certain testimony to be read, the jury indicated that its deliberations were continuing in a rational fashion. Thirdly and most importantly, neither defense counsel below at the time he

learned of the note nor new counsel on appeal has offered any suggestion as to how defendant may have been prejudiced in the least by Judge Carter's actions.* Absent any showing of prejudice, the error, such as it was, was beyond any doubt harmless. *See, e.g., United States* v. *Reynolds, supra; United States* v. *Arriagada, supra;* see also the cases collected in *United States* v. *Crutcher, supra,* 405 F.2d at n. 2.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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JOHN N. BUSH,
AUDREY STRAUSS,
Assistant United States Attorneys,
Of Counsel.

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* Defendant cites *Rogers* v. *United States, supra,* and *Shields* v. *United States,* 273 U.S. 583 (1927) in support of his argument. In both cases, the judges' communications with the jury lead directly to the juries' verdicts, and the notes and answers thereto were such that the judges' forbidden communications appeared to have a direct affect on the juries in reaching their verdict. The factual situation in these cases was, therefore, far different from the situation discussed in the text.

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Form 280 A. -Affidavit of Service by Mail

76-1188

AFFIDAVIT OF MAILING

State of New York)
County of New York)

HELEN KOWALSKI being duly sworn deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

Stating also that on the **22nd** day of **July, 1976** he served a copy of the within by placing the same in aproperly postpaid franked envelope addressed:

ALBERT J. KRIEGER and
745 Fifth Ave.
New York, N.Y. 10022

Joseph Beeler
2829 Bird Ave.
Coconut Grove
Miami, Florida 33133

And deponent further says that **s**he sealed the said envelope and placed the same in the mailbox for mailing at the United States Courthouse **annex, 1 St. Andrew's Plaza** Borough of Manhattan, City of New York

Helen Kowalski

Sworn to me before this

22nd day of **July, 1976.**

Gloria Calabrese

GLORIA CALABRESE
Notary Public, State of New York
24-0525340
Qualified in Kings County
Commission Expires March 30, 1977